



## ENVIRONMENTAL PROTECTION AGENCY

[FRL-9766-2]

### **California State Nonroad Engine Pollution Control Standards; Off-Highway Recreational Vehicles and Engines; Request for Authorization; Opportunity for Public Hearing and Comment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The California Air Resources Board (CARB) has notified EPA that it has adopted regulations to amend its Off-Highway Recreational Vehicle and Engines (“OHRV”) Regulations. By letter dated March 24, 2010, CARB submitted a request that EPA authorize these regulations under section 209(e) of the Clean Air Act (CAA), 42 U.S.C. 7543(b). CARB seeks confirmation that certain of the amendments are within the scope of a prior authorization issued by EPA, and that certain of the amendments require and merit a new authorization. This notice announces that EPA has tentatively scheduled a public hearing to consider California’s request, and that EPA is now accepting written comment on the request.

**DATES:** EPA has tentatively scheduled a public hearing concerning CARB’s request on January 30, 2013, at 10:00 a.m. at EPA’s offices at 1310 L Street, NW, Washington, D.C. 20005. EPA will hold a hearing only if any notifies EPA that it will present oral testimony at the hearing. Parties wishing to present oral testimony at the public hearing must provide written notice by January 17, 2013 to Suzanne Bessette at the e-mail address noted below. If EPA does not receive a request for a public hearing, it will not hold a hearing and instead will consider CARB’s request based on written submissions to the docket. Any party may submit written comments by March 1, 2013.

By January 25, 2013, any person who plans to attend the hearing may check the following webpage for an update, <http://www.epa.gov/otaq/cafr.htm>, or may call Suzanne Bessette at (734) 214-4703 to learn if a hearing will be held.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2012-0742, by one of the following methods:

- On-Line at <http://www.regulations.gov>: Follow the On-Line Instructions for Submitting Comments.
- E-mail: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).
- Fax: (202) 566-1741.
- Mail: Air and Radiation Docket, Docket ID No. EPA-HQ-OAR-2012-0742, U.S. Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Please include a total of two copies.
- Hand Delivery: EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*On-Line Instructions for Submitting Comments:* Direct your comments to Docket ID No. EPA-HQ-OAR-2012-0742. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you

consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will automatically be captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

EPA will make available for public inspection materials submitted by CARB, written comments received from any interested parties, and any testimony given at the public hearing. Materials relevant to this proceeding are contained in the Air and Radiation Docket and Information Center, maintained in Docket ID No. EPA-HQ-OAR-2012-0742. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government work days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the

Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's Web site is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the <http://www.regulations.gov> website, enter EPA-HQ-OAR-2012-0742 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality also maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to several of the prior *Federal Register* notices which are cited throughout today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

**FOR FURTHER INFORMATION CONTACT:** Suzanne Bessette, Attorney-Advisor, Office of Transportation and Air Quality, Compliance Division, U.S. Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105. Telephone: (734) 214-4703. Fax: (734) 214-4053. E-mail address: [Bessette.Suzanne@epa.gov](mailto:Bessette.Suzanne@epa.gov).

<mailto:Dickinson.David@EPA.GOV>. **SUPPLEMENTARY INFORMATION:**

#### **I. CARB's Prior OHRV Authorization, Within-the-Scope Requests, and New Requests**

In 1995, the California Air Resources Board ("CARB") requested that EPA authorize California's exhaust emission standards and test procedures for nonroad recreational vehicles

and engines (“OHRVs”). EPA authorized these regulations in 1996.<sup>1</sup> CARB’s March 24, 2010, letter to the Administrator notified EPA that CARB has adopted a number of amendments to its 1995 OHRV regulations. CARB adopted the first amendments in 1999, a second set of amendments in 2003, and the latest amendments in 2006. CARB requested that EPA authorize each of these three amendment packages in letters dated March 24, 2000, November 19, 2004, and March 24, 2010, respectively. The March 24, 2010 request explicitly incorporates the previous two requests, and EPA intends to consider all three requests concurrently.

The 1999 OHRV amendments did not change the numerical exhaust emission standards, but added a new compliance category so that vehicles not meeting the OHRV emissions standards could be certified subject to use restrictions (i.e., use in specified areas during specified times of the year). Non-emissions-compliant OHRVs would be identified with a red sticker or “tag,” and emissions-compliant OHRVs would be identified with a green sticker. The amendments also added ATVs over 600 lbs to the existing definition of ATV and removed the competition vehicle exclusion provision. CARB requested a within-the-scope determination for the red-tag program and for the removal of the competition exclusion, and a new authorization for the addition of ATVs over 600 lbs.

According to CARB, the goal of the 1999 amendments was to provide economic relief to vehicle dealers in California who were contractually bound to sell products that did not meet the emission standards established in 1994.<sup>2</sup> Prior to the amendments, two-stroke off-highway motorcycles could only be sold as “competition” models, and their use was limited to closed-

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<sup>1</sup> California State Nonroad Engine and Vehicle Pollution Control Standards; Authorization of State Standards; Notice of Decision, 61 FR 69093 (December 31, 1996).

<sup>2</sup> California Air Resources Board (“CARB”), Request for Authorization, March 24, 2000, at 2.

course competitions. Following the amendments, such vehicles would be “red-tagged” and allowed to operate during certain times in certain areas. The amendments provided for noncompliant, i.e., red-tagged, vehicles to be certified and sold in California and to be operated in two situations. First, in “unlimited use areas,” which are located in regions classified as in attainment for the State’s one-hour ozone air quality standard, non-emission-compliant OHRVs could be used year-round. Second, in “limited use areas,” which are located in regions classified as nonattainment for the one-hour ozone air quality standard, non-emission-compliant OHRVs could be used only during “riding seasons” specified for each area. The riding seasons in limited use areas were intended to restrict non-emission-compliant vehicles from operating during peak ozone periods. Out of more than 100 designated riding areas, approximately one-third were unlimited use areas.<sup>3</sup> The vast majority of the riding areas are on public lands managed by the California Department of Parks and Recreation, the United States Forest Service, and the United States Bureau of Land Management. CARB predicted that the red tag program would cause higher emissions and a “possible minor impact on PM or toxics” in unlimited use areas, limited use areas during non-peak seasons, and on a state-wide average; and predicted lower emissions in limited use areas during peak seasons.<sup>4</sup>

The 2003 amendment modified the OHRV regulations to indicate that riding season use restrictions would begin with the 2003 model year. The request letter regarding this amendment stated that the amendment was needed to correct the “practical delay” in enforcement of the 1999

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<sup>3</sup> CARB, Initial Statement of Reasons, Public Hearing to Consider Amendments to the California Regulations for New 1997 and Later Off-Highway Recreational Vehicles and Engines, October 23, 1998, at 6.

<sup>4</sup> *Id.* at 8.

red-tag amendment.<sup>5</sup> CARB sought a within-the-scope finding for this amendment.<sup>6</sup> CARB also reaffirmed its approval of its 1999 amendments, analyzing them in comparison to the later federal OHRV regulations promulgated in 2002.<sup>7</sup>

The 2006 amendments made three further changes to California's OHRV regulations. First, they added evaporative emissions standards for OHRVs aligned with federal standards for 2008 and later model year vehicles. Second, the amendments reclassified sand cars, off-road utility vehicles and off-road sport vehicles as OHRVs, which is aligned with the federal classification of these vehicles. Each of these vehicles had previously been regulated under other federally-approved California regulations as small off-road or large off-road spark-ignition engines. The amendment set emissions standards for these three additional classes of vehicles. Third, the list of riding areas and riding seasons was amended.

CARB's 2010 request regarding the 2006 amendments sought (1) a new authorization for the evaporative emissions standard, (2) a within-the-scope determination for the reclassification of sand cars, off-road sport vehicles and off-road utility vehicles and (3) a declaration that the riding areas and riding seasons amendment does not require EPA authorization because the list is an "operational control" that cannot be federally preempted, pursuant to Clean Air Act section 209(d). California also requested that in the alternative, the riding season amendments be considered within the scope of the 1996 authorization. Finally, the 2010 letter requested that

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<sup>5</sup> CARB, Request for Authorization, November 19, 2004, at 1.

<sup>6</sup> At the same time, CARB argued that future amendments of riding seasons and riding areas should not be subject to EPA approval, because they should be treated as "operational controls" not preempted under section 209(d) of the Clean Air Act. *Id.* at note 1.

<sup>7</sup> Prior to 2002, there were no federal emissions standards for OHRVs. The federal regulations promulgated in 2002 were codified at 40 CFR Part 1051, *see* 67 FR 68242 (November 8, 2002), and later amended in 2008, *see* 73 FR 59034 (October 8, 2008).

EPA concurrently consider and render a decision on the pending 1999 and 2003 amendments authorization requests.

## **II. Clean Air Act Nonroad Engine and Vehicle Authorizations**

Section 209(e)(1) of the Clean Air Act prohibits States and local governments from adopting or attempting to enforce any standard or requirement relating to the control of emissions from new nonroad vehicles or engines. The Administrator must authorize California to enforce its own standards upon making specific findings, detailed below. Section 209(d) precludes federal preemption of state standards that “control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.” State laws governing use, operation, or movement of motor vehicles do not, therefore, require federal authorization.

### **A. Criteria for New Authorization Determinations**

Section 209(e)(1) of the Clean Air Act preempts states from regulating (subparagraph A) new engines smaller than 175 horsepower that are used in construction equipment or vehicles or farm equipment or vehicles and (subparagraph B) new locomotives or engines used in locomotives. Section 209(e)(2)(A) requires the Administrator to grant California authorization to adopt and enforce its own standards for new nonroad engines not included in subparagraphs (A) and (B) of paragraph (1), under certain circumstances:

[...] the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

Authorization shall not be granted, however, if the Administrator finds that (i) the determination of the state is arbitrary and capricious, (ii) the state does not need the state standards to meet



compelling and extraordinary conditions, or (iii) the state standards and accompanying enforcement procedures are not consistent with this section.<sup>8</sup>

EPA has historically interpreted the section 209(e)(2)(iii) “consistency” inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).<sup>9</sup> In order to be consistent with section 209(a), California’s nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California’s nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same “consistency” criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California “standards and accompanying enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if: (1) there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.<sup>10</sup>

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<sup>8</sup> 40 CFR §1074.105.

<sup>9</sup> 59 FR 36969 (July 20, 1994).

<sup>10</sup> To be consistent, the California certification procedures need not be identical to the Federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet the

## **B. Criteria for Within-the-scope Determinations**

When California makes a minor amendment to regulations that EPA has previously authorized, EPA can confirm that the amendment is within the scope of the previously granted authorization. In this situation, EPA does not typically go through the full analysis for a new request, but instead grants authorization by reference to the analysis and approval of the original authorization. A within-the-scope amendment is permissible if three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.

## **III. Request for Comment**

EPA invites public comment on CARB's entire request, including but not limited to the following issues.

### **A. 1999 Amendments**

First, should California's 1999 OHRV amendments, specifically the provision for certification of OHRVs that do not meet the emissions criteria (the "red tag" amendment) and the removal of the competition exemption, be considered under the within-the-scope analysis or should they be considered under the "new" authorization criteria? If those amendments should be considered as a within-the-scope request, do they meet the criteria for EPA to grant a within-the-scope confirmation? Alternatively, if the "red tag" amendment and removal of the

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state and the Federal requirements with the same test vehicle in the course of the same test. 43 FR 32182 (July 25, 1978).

competition exemption should not be considered under the within-the-scope analysis, or in the event that EPA does not determine they are within-the-scope of the previous authorization, do they meet the criteria for making a new authorization determination?

Second, does the removal of the 600 lb weight limitation in the definition of “ATV” meet the criteria for making a new authorization determination?

#### **B. 2003 Amendment**

Should the amendment limiting the red tag program to model years 2003 and later be under the within-the-scope criteria, and if so, does it meet the within-the-scope criteria for authorization? To the extent that the 2003 amendment should be treated as a new authorization request, does it meet the criteria for a new authorization?

#### **C. 2006 Amendments**

First, does the amendment setting evaporative emissions standards for OHRVs meet the criteria for new authorizations? Second, does the amendment reclassifying sand cars, off-road sport vehicles and off-road utility vehicles as OHRVs fall within-the-scope of the original (1996) authorization? Third, does the amendment altering the list of riding areas and riding seasons require federal authorization review, or is it not federally preempted, pursuant to CAA § 209(d)? If it is preempted and therefore requires federal approval, does the amended list of riding areas and seasons fall within-the-scope of the original (1996) authorization?

### **IV. PROCEDURES FOR PUBLIC PARTICIPATION:**

If a hearing is held, the Agency will make a verbatim record of the proceedings. Interested parties may arrange with the reporter at the hearing to obtain a copy of the transcript at their own expense. Regardless of whether a public hearing is held, EPA will keep the record

open until March 1, 2013. Upon expiration of the comment period, the Administrator will render a decision on CARB's request based on the record from the public hearing, if any, all relevant written submissions, and other information that she deems pertinent. All information will be available for inspection at the EPA Air Docket No. EPA-HQ-OAR-2012-0742.

Persons with comments containing proprietary information must distinguish such information from other comments to the greatest extent possible and label it as "Confidential Business Information" ("CBI"). If a person making comments wants EPA to base its decision on a submission labeled as CBI, then a non-confidential version of the document that summarizes the key data or information should be submitted to the public docket. To ensure that proprietary information is not inadvertently placed in the public docket, submissions containing such information should be sent directly to the contact person listed above and not to the public docket. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed, and according to the procedures set forth in 40 CFR Part 2. If no claim of confidentiality accompanies the submission when EPA receives it, EPA will make it available to the public without further notice to the person making comments.

Dated: December 26, 2012.

Christopher Grundler, Director,  
Office of Transportation and Air Quality,  
Office of Air and Radiation.

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